United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit
FILED SEP 5 1963
Nathan J. Paulson
CLERK

No. 17,955

JOHN H. LEAKS,

Appellant,

v.

THE UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN J. DWYER

602 - 5th Street, N.W.
Washington, D. C.

Counsel for Appellant

STATEMENT OF QUESTIONS PRESENTED

I

Whether: when officers executing an arrest warrant affect the arrest at the front door of an apartment house, they: (1) have the right to follow the arrested person who is directed by them to enter her apartment and arrest another person therein whom they have probable cause to arrest only after entry; (2) the Court can find implied consent by the arrested person to the entry; and (3) whether they (the officers) must first announce their purpose and authority.

II

Whether: guilt can be presumed of a joint tenant of an apartment of the possession of narcotics which are found in a drawer in the apartment.

INDEX

TABLE OF CASES

Page

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,955

JOHN H. LEAKS,

Appellant,

v.

THE UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a final order of the United States District Court for the District of Columbia. The jurisdiction of this Court is invoked under Section 1291, Title 28, United States Code. The judgment appealed from is a final judgment within the meaning of the aforesaid statutory provisions. An appeal was duly noted and perfected within the time limitations provided by the applicable statutes and the General Rules of this Court.

STATEMENT OF THE CASE

The appellant was charged in an eight count indictment together with one Virginia Stewart for violations of 26 U.S.C. 4704(a) and 21 U.S.C. 174, to wit: possession of narcotic drugs. The first two counts pertained only to the co-defendant and the Court found the appellant not guilty on counts three and four because "the memory of the agents was at fault" (JA 10). The Court further found that counts seven and eight were merged in counts five and six on which the Court (sitting without a jury) found the appellant guilty. Counts five and six referred to 13 capsules (JA 16) and counts seven and eight refer to 162 capsules.

Agents Wurms and Thompson, attached to the Federal Bureau of Narcotics testified that on 16 April 1962 they went to premises 1827 S Street, N.W., in the District of Columbia, to execute an arrest warrant for a co-defendant Virginia Stewart (JA 13). Agent Wurms went to the rear door of the building and Agent Thompson to the front door where he rang the door bell (JA 13). Virginia Stewart answered the door and Agent Thompson placed her under arrest. Behind the front door at which the arrest took place, there was a public hall, off of which two apartments led, one belonging to appellant and Stewart and the other to the janitor. Thompson found Stewart dressed only in a slip and asked her if she wanted more clothes. He then asked her where her apartment was and she led him up three steps and he followed her (JA 14). He then told her his partner was at the back door and asked her how he could get him in. She approached a door leading to the rear of the first floor and opened it. Thompson followed her in and saw appellant seated on a bed. He told appellant not to move; that he was under arrest and for Virginia Stewart to go to the rear door (in another room) and let Wurms in. She went back through the house and did this (JA 14). Wurms testified that when he was let in by Stewart he seized 13 capsules mentioned in counts 5 and 6 from a night table drawer and also 162 capsules from the same place, these being the ones referred to in counts 7 and 8.

STATUTES INVOLVED

18 United States Code, Section 3109

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

26 United States Code 4704(a)

> It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

21 United States Code 174

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States shall be fined not more than $2,000 and imprisoned not less than two or more than five years. . . .
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

STATEMENT OF POINTS

I

(1) The officers entered the apartment wherein narcotics were found without color of authority.

(2) There was no consent to the entry of the officers.

(3) There was no compliance with the statutory requirements of knocking, announcement of purpose and authority before entry.

II

As a matter of law, there was no proof of possession of narcotics.

SUMMARY OF ARGUMENT

I

The officers had no right to be in the apartment wherein they found the probable cause to make the arrest of the appellant and which justified their subsequent search during which the incriminating evidence was found: (1) their arrest was made and authority terminated at the front door of the building; (2) there was no consent to the later entry into the apartment; and (3) there was no knocking, announcement of authority and purpose and refusal of entry.

II

The lower court erred when it found as a matter of fact and law that the appellant was in possession of narcotics when the only evidence was that they were found in a drawer of a night table in an apartment shared by him with another person who was physically present at the time.

ARGUMENT

I

The Fourth Amendment to the Constitution of the United States prohibits unreasonable searches and is one of society's fundamental safeguards. Since its adoption it has been the subject of innumerable legal decisions. It appears, however, that a principle of law has clearly emerged from these decisions and it hinges on the word "unreasonable". Of course the Amendment must be construed liberally for the person aggrieved; Gouled v. U.S., 255 U.S. 298, 65 L. Ed. 647, 41 S.Ct. 261; Grau v. U.S., 287 U.S. 124, 63 S.Ct. 38, 77 L. Ed. 212, which states that the search cannot be made lawful by what it brings to light. Byars v. U.S., 273 U.S. 28, 7 S.Ct. 248, 71 L. Ed. 520; U.S. v. Veeder, 246 U.S. 675, 62 L. Ed. 933, 38 S.Ct. 425; that a person's home or place of business are not to be invaded forcibly and searched unless a warrant exists and as stated by Mr. Justice Butler in U.S. v. Lefkowitz, 285 U.S. 452, 76 L. Ed. 877, 52 S.Ct. 420:

> The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy. . . . Its protection extends to offenders as well as to the law abiding.

A search is unreasonable unless authorized by a valid search warrant, is incident to a valid arrest or is made in other exceptional circumstances which dispense with the need for a search warrant. U.S. v. Jeffers, 342 U.S. 48, 96 L. Ed. 59; U.S. v. Rabinowitz, 338 U.S. 52, 70 S.Ct. 188, 94 L. Ed.2 544; Giordenello v. U.S., 357 U.S. 480, 2 L.Ed.2d 1503, 78 S.Ct. 1245, Jones v. U.S., 357 U.S. 493, 2 L.Ed. 2d 1514, 78 S.Ct. 1253.

(1)

In the instant action the officers came to the premises with a valid arrest warrant for Stewart and made the arrest at the front door of the premises (JA 13). This is undisputed by the officers' statements and

the law as enunciated by this Court in U.S. v. Kelley, 111 App. D.C. 396, 298 F.2d 310; Coleman v. U.S., 111 App. D.C. 210, 295 F.2d 555; U.S. v. Di Re, 332 U.S. 581, 92 L. Ed. 210, 68 S.Ct. 222; Rios v. U.S., 264 U.S. 253. There is no question but what the officers had a right to search Stewart then and there at the time of her arrest. Brainard v. U.S., 95 App. D.C. 121, 220 F.2d 384. This was a public hall as in Jennings v. U.S., 101 App. D.C. 198, 247 F.2d 784; however, the difference is that here we have no misdemeanor taking place in view of the officers.

At this moment of time, the officers had effected their purpose by executing the arrest warrant. No emergency was involved; no warrant for the entry of the apartment was outstanding; there was no probable cause to enter the apartment. In Morrison v. U.S., 104 App. D.C. 352, 262 F.2d 449, this Court held that officers without a warrant cannot enter, even without breaking, a private dwelling to search for a suspected felon, no permission having been given, and no circumstances of necessitous haste being present. This Court relied there on Miller v. U.S., 357 U.S. 301, 2 L.Ed.2d 1332, 78 S.Ct. 1190 and Accarino v. U.S., 85 App. D.C. 394, 179 F.2d 456, both of which involved breaking. Here, however, there was no need to search for anyone. The police had the person for whom they were looking. There was no uninterrupted search as in Washington v. U.S., 101 App. D.C. 58, 263 F.2d 742.

(2)

At this juncture of the case with the law being pretty well settled as above, the officers had to give some justification for their entry. Apparently it was based on consent. The testimony showed that the officer asked Stewart if she wanted some more clothes and she said yes (JA 14). This might have been helpful to their point if left alone, but the testimony shows that before getting to the apartment the officer was then more interested in getting his partner into the building. It is significant that the testimony as reflected in the transcript then shows the woman turned around and entered a door leading to the rear of the first floor. The

officer followed her into the apartment where he then saw enough to constitute probable cause for the arrest of the appellant and to conduct the search which revealed the incriminating evidence.

The lower court appeared to base its conviction and adverse ruling on some kind of implied consent. It was thought that this question was long ago and quite frequently resolved. Waldron v. U.S., 95 App. D.C. 66, 219 F.2d 37; U.S. v. Jeffers, 342 U.S. 48, 96 L.Ed. 59; Judd v. U.S., 89 App. D.C. 64, 190 F.2d 649; Rigby v. U.S., 101 App. D.C. 178, 247 F.2d 584; and many others cited in Nelson v. U.S., 93 App. D.C. 14, 208 F.2d 505. It thus becomes readily apparent from the transcript of testimony and the existing law that the officers had no consent to enter.

Appellant contends that the factual situation makes this case analogous to the line of cases in which officers obtained entry by subterfuge. Work v. U.S., 100 App. D.C. 237, 243 F.2d 660, Gatewood v. U.S., 93 App. D.C. 226, 209 F.2d 789; Jones v. U.S., 357 U.S. 493, 2 L.Ed.2d 1514, 78 S.Ct. 1253. In other words, the officers would have observed nothing had they not been where they had no right to be. In this connection it is interesting to consider the cases of Whitley v. U.S., 99 App. D.C. 159, 237 F.2d 787, where the officers observed a narcotics violation from a porch roof, and U.S. v. Williams, 105 App. D.C. 41, 263 F.2d 487, where officers observed a missing coat button.

(3)

There was no question herein about any request for admission, announcement of purpose or denial of admission. While most of the cases on this point have involved the actual breaking of a door, this Court stated in U.S. v. Hair, 110 App. D.C. 153, 289 F.2d 894, that only the sheerest sophistry would describe as "peaceable" the charge of three police officers across the threshold of a home. As this Court further stated in Keiningham v. U.S., 109 App. D.C. 272, 287 F.2d 126, "a person's right to privacy in his home . . . is governed by something more than the fortuitous circumstance of an unlocked door . . ." The law on this type of

entry, it is submitted, is covered by 18 U.S. Code, Section 3109; Palmer v. King, 41 App. D.C. 419; Gatewood v. U.S., supra; Masiello v. U.S., 113 App. D.C. 32, 304 F.2d 399; all of which cover the requirements mentioned in this section. None of the requirements was fulfilled.

II

The narcotics in the instant action, possession of which the appellant was convicted, were found in a night table drawer in an apartment occupied by the appellant and Virginia Stewart, both of whom were present in the apartment at the time of finding. In U.S. v. Colis, 101 App. D.C. 160, 247 F.2d 566, wherein it was charged that appellant and another were participating in an illegal narcotic sale, the officer testifying that he did not know who had dropped the narcotics, this Court found: ". . . reasonable men must of necessity have a reasonable doubt as to appellant's possession of the contraband or participation in a purchase or contemplated purchase." Citing Curley v. U.S., 81 App. D.C. 389, 160 F.2d 229, cert. den. 331 U.S. 837. There, as here, the jury or the Court in the instant action, could find possession only by guessing or speculating.

In Jackson v. U.S., 102 App. D.C. 109, 250 F.2d 772, where narcotics were found hidden in some third person's room to which defendant had a key, this Court again refused to allow the presumption of possession. U.S. v. Berry, 107 App. D.C. 76, 274 F.2d 585, which was a case involving numbers slips and where appellant was in the constant company of gamblers carrying on illegal activity, this Court reversed without even ordering a new trial. There is no question but what the statute in question creates a presumption based on a "factual presumption" that one who has unstamped drugs in his possession, has them for an unlawful purpose. As this Court stated in U.S. v. Jackson, 102 App. D.C. 109, 250 F.2d 772, there is no presumption that access means possession. In Hallman v. U.S., 93 App. D.C. 39, 208 F.2d 825, this Court found that the appellant owner of a room wherein narcotics were found

in his shoes in his presence was in possession. This, however, is a far different factual situation than presented in the instant action. It was thought that U.S. v. Di Re, 332 U.S. 581, 92 L. Ed. 210, 68 S.Ct. 222, resolved this question of presumption based on presumption.

CONCLUSION

It is respectfully submitted that this case should be reversed with instructions to direct a verdict of not guilty because the only material evidence against appellant was obtained unlawfully and/or in the alternative because reasonable men must necessarily have had a reasonable doubt as to appellant's possession.

Respectfully submitted,

JOHN J. DWYER

602 5th Street, N.W.
Washington, D. C.

Counsel for Appellant

INDEX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on May 1, 1962

THE UNITED STATES OF AMERICA)	Criminal No. 541-'62
v.)	Grand Jury No. 594-62
JOHN H. LEAKS # 1)	Violation: 26 U.S.C. 4704(a)
VIRGINIA D. J. STEWART # 2)	21 U.S.C. 174
	(Possession of narcotic drugs: facilitation of concealment and sale of narcotic drugs, knowing same to have been imported contrary to law)

DOCKET ENTRIES

Date	No. 1, 2: Proceedings
1962	
June 18	Presentment and Indictment filed (8 Counts)
June 18	No. 1, 2: Copy of indictment mailed to deft. Cert. filed.
June 22	No, 1, 2: ARRAIGNED, Plea NOT GUILTY entered; Defendant ON BOND; Attorney not present. No. 2: Bond in this Case to also apply to Case No. 542-62. McGUIRE, C. J. (Reporter-P.Mallon)
June 22	No. 1, 2: TRANSCRIPT OF PROCEEDINGS of June 22, 1962, filed. Clerk's Copy (Reporter-P.Mallon)
July 10	No. 1, 2: AFFIDAVIT in support of application to proceed without prepayment of costs GRANTED and filed. KEECH, J.
July 10	No. 1: ORDER APPOINTING Patrick J. Head as counsel to defend, filed. KEECH, J.
July 10	No. 2: ORDER APPOINTING Ralph C. Cole as counsel to defend, filed. KEECH, J.
July 17	No. 2: ORAL MOTION of Ralph C. Cole, attorney for Defendant Number 2, to WITHDRAW as counsel, heard

Date	No. 1, 2:	Proceedings
1962		
		and GRANTED. Referred for appointment of counsel. Cert. filed. CURRAN, J. (Rep. B. Williamson)
July 18		No. 2: ORDER VACATING appointment of Ralph C. Cole and APPOINTING Harvey Rosenberg as counsel to defend, filed. CURRAN, J.
Aug. 17		No. 2: MOTION of DEFENDANT to exact Fees and motion to suppress, filed, and DENIED. Cert. of Serv. HART., J. (Rep.-George Davis)
Sept. 13		No. 1: MOTION of DEFENDANT to suppress and motion for Mental Examination and Affidavit, filed. Cert. of Serv.
Sept. 24		No. 1: ORDER COMMITTING Defendant to St. Elizabeths Hospital for Ninety (90) Days filed. Defendant SURRENDERED by Bondsman, J. W. Carter and COMMITTED to St. Elizabeth's Attorney Patrick Head present; YOUNGDAHL, J. (Reporter - Kaufman)
Dec. 24		No. 1: Letter dated 12-20-62 from Dale C. Cameron, M.D., Superintendent, St. Elizabeths Hospital, advising that Defendant is MENTALLY COMPETENT to understand the nature of the proceedings against him, filed. Copy to Atty.
1963		
Jan. 3		No. 1: ORAL MOTION of DEFENDANT to reset bond. GRANTED; BOND RESET at $2000.00. Defendant not present. Attorney Patrick J. Head present. McGUIRE, C.J. (Reporter-J. Rawls) Cert. filed.
Jan. 4		No. 1: RECOGNIZANCE in the sum of $2,000.00 taken with John W. Carter, Surety, filed.
Jan. 8		No. 1: MOTION of DEFENDANT for separate trial, filed. Cert. of Serv.
Jan. 18		No.1 - JOHN H. LEAKS: MOTION of DEFENDANT for separate trial heard, argued and DENIED; Defendant ON BOND; Attorney Patrick J. Head present. McGUIRE, C. J. (Reporter-J. Rawls) Cert. filed.
Feb. 13		No. 1: Motion of Defendant for issuance of subpoena and Affidavit in support thereof, filed and GRANTED. McGUIRE, C. J. Cert. of Serv.
Feb. 25		~~No. 1: DEFENDANT SURRENDERED by J. W. Carter, Surety SURETY EXONERATED; Defendant COMMITTED to the District of Columbia Jail;~~

Date	No. 1, 2:	Proceedings

1963

Feb. 25 — No.1:
Defendant SURRENDERED by J. W. Carter, Surety; SURETY EXONERATED; Defendant COMMITTED to the District of Columbia Jail.Commitment Issued; Attorney Patrick Head present. McGUIRE, C. J. (Reporter-R. Henderson)

Mar. 12 — No. 1 - JOHN H. LEAKS: APPEARANCE of Patrick J. Head as counsel for defendant entered withdrawn per praecipe, filed. (fiat) HART, J.

Mar. 12 — No. 1 - JOHN H. LEAKS:
ORAL MOTION of DEFENDANT for reinstatement of bond heard and GRANTED; BOND REINSTATED AT $2000.00; Defendant REMANDED to the District of Columbia Jail; Attorney John Dwyer present. HART, J. (Reporter-George Davis) Cert. filed.

Mar. 12 — No.1: APPEARANCE OF John J. Dwyer entered and filed. RECOGNIZANCE in the sum of $2,000.00 taken with Resolute Insurance Company, Surety, filed.

Mar. 25 — No. 2 - VIRGINIA D. J. STEWART:
BENCH WARRANT ORDERED AND ISSUED:
ORAL MOTION OF COUNSEL OF DEFENDANT to withdraw from case as Court APPOINTED COUNSEL is by the Court GRANTED. Attorney Harvey Rosenberg present. McGUIRE, C. J. (Reporter-R. Henderson) Cert. filed.

May 13 — No. 1 - JOHN H. LEAKS:
Waiver of trial by jury, filed; With the consent of the U. S. Attorney and the approval of the Court, the defendant WAIVES his right to trial by jury;
TRIAL BY COURT BEGUN; FINDING: NOT GUILTY on Counts three and four; GUILTY on Counts five and six; Defendant COMMITTED to the District of Columbia Jail; COMMITMENT ISSUED; Case is REFERRED to the Probation Officer of the Court;

Attorney John J. Dwyer present. HOLTZOFF, J. (Reporter-G. Nevitt) Cert. filed.

June 7 — No. 1: SENTENCED to imprisonment for a period of TWO (2) YEARS, 4 months to Seven (7) years on Count 5; SEVEN (7) YEARS on Count 6; said sentence by the counts to RUN CONCURRENTLY. Defendant REMANDED to the District of Columbia Jail; Attorney John J. Dwyer present. HOLTZOFF, J. (Reporter-Gerald Nevitt)

Date	No. 1, 2:	Proceedings
1963		
June 10		No. 1: Judgment & Commitment of 6-7-63, filed. HOLTZOFF, J.
June 13		No. 1: TRANSCRIPT OF PROCEEDINGS, Vol. 1, Pages 1-69, May 13, 1963, filed. Court's Copy (Reporter-Nevitt)
June 14		No. 1: NOTICE OF APPEAL, filed. Clerk's Fee of $5.00 paid and credited to the United States.
June 21		No. 1: REFUSAL of DEFENDANT to sign election against service of sentence,filed.
June 24		No. 1: TRANSCRIPT OF PROCEEDINGS, Vol. 1, Pages 1-69, May 13, 1963, filed. Deft's Copy (Reporter-Nevitt)

[Filed June 18, 1962] [INDICTMENT]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on May 1, 1962

The United States of America v. John H. Leaks Virginia D. J. Stewart	Criminal No. 541-'62 Grand Jury No. 594-62 Violation: 26 U.S.C. 4704(a) 21 U.S.C. 174 (Possession of narcotic drugs: facilitation of concealment and sale of narcotic drugs, knowing same to have been imported contrary to law)

The Grand Jury charges:

On or about April 16, 1962, within the District of Columbia, Virginia D. J. Stewart purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, one glassine bag containing a mixture totaling about 13,430 milligrams of heroin hydrochloride, quinine hydrochloride and mannitol.

SECOND COUNT:

On or about April 16, 1962, within the District of Columbia, Virginia D. J. Stewart facilitated the concealment and sale of a narcotic drug, that is, one glassine bag containing a mixture totaling about 13,430 milligrams of heroin hydrochloride, quinine hydrochloride and mannitol, after said heroin hydrochloride had been imported, with the knowledge of Virginia D. J. Stewart, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the first count of this indictment.

THIRD COUNT:

On or about April 16, 1962, within the District of Columbia, John H. Leaks purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, one glassine bag containing a mixture totaling about 5,420 milligrams of heroin hydrochloride, quinine hydrochloride and mannitol.

FOURTH COUNT:

On or about April 16, 1962, within the District of Columbia, John H. Leaks facilitated the concealment and sale of a narcotic drug, that is, one glassine bag containing a mixture totaling about 5,420 milligrams of heroin hydrochloride, quinine hydrochloride and mannitol, after said heroin hydrochloride had been imported, with the knowledge of John H. Leaks, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the third count of this indictment.

FIFTH COUNT:

On or about April 16, 1962, within the District of Columbia, John H. Leaks and Virginia D. J. Stewart purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, thirteen capsules containing a mixture totaling about 400 milligrams of heroin hydrochloride, quinine hydrochloride and mannitol.

SIXTH COUNT:

On or about April 16, 1962, within the District of Columbia, John H. Leaks and Virginia D. J. Stewart facilitated the concealment and sale

of a narcotic drug, that is, thirteen capsules containing a mixture totaling about 400 milligrams of heroin hydrochloride, quinine hydrochloride and mannitol, after said heroin hydrochloride had been imported, with the knowledge of John H. Leaks and Virginia D. J. Stewart, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the fifth count of this indictment.

SEVENTH COUNT:

On or about April 16, 1962, within the District of Columbia, John H. Leaks and Virginia D. J. Stewart purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, one hundred and ninety-six capsules containing a mixture totaling about 6,470 milligrams of heroin hydrochloride, quinine hydrochloride, milk sugar and mannitol.

EIGHTH COUNT:

On or about April 16, 1962, within the District of Columbia, John H. Leaks and Virginia D. J. Stewart facilitated the concealment and sale of a narcotic drug, that is, one hundred and ninety-six capsules containing a mixture totaling about 6,470 milligrams of heroin hydrochloride, quinine hydrochloride, milk sugar and mannitol, after said heroin hydrochloride had been imported, with the knowledge of John H. Leaks and Virginia D. J. Stewart, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the seventh count of this indictment.

/s/ David C. Acheson
Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

/s/
Foreman.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
vs.	)	Criminal No. 541-62
JOHN H. LEAKS,	)	
Defendant.	)	

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Washington, D. C.
May 13, 1963.

The above cause came on for trial before the HONORABLE ALEXANDER HOLTZOFF, United States District Judge, at 1:45 p.m.

* * * * *

MR. DWYER: May it please the Court, may the record indicate the defendant is signing in open court a waiver of trial by jury, and also I, as counsel for the defendant, am signing a waiver of trial by jury.

THE COURT: Very well.

* * * * *

OPENING STATEMENT IN BEHALF OF GOVERNMENT

* * * * *

MR. BLACKWELL: Well, if Your Honor please, I certainly, as in all instances, I will bow in all deference to Your Honor's ruling in this matter. It certainly -- the evidence is going to show this is all one transaction in the same apartment, the same day, and within a short time, Your Honor.

* * * * *

OPENING STATEMENT IN BEHALF OF DEFENDANT

* * * * *

THE COURT: Whose apartment was this?

MR. DWYER: It belonged to the defendant Leaks, if Your Honor please, and we have no quarrel with the fact that Virginia Stewart was

living there. This is admitted. As I say, there are very few disputes on the facts, if Your Honor please.

* * * * *

THE COURT: It is stipulated, therefore, that the apartment where the narcotics were found was an apartment of which the defendant Leaks was the tenant and that the defendant Stewart lived in that apartment with him.

MR. DWYER: Yes, Your Honor.

* * * * *

IVAN WURMS

called as a witness by the Government, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BLACKWELL:

* * * * *

Q. And who was with you, sir? A. Narcotic Agent John Thompson.

Q. Why did you go to 1827 S Street premises, sir? A. We had an outstanding arrest warrant for Virginia Della Stewart.

Q. Now, will you tell us what you did when you went there? A. Agent Thompson went through the front door and I covered the rear door. It was about 11:15, 11:30. The rear door opened and Virginia Stewart admitted me into the premises, at which time I went to the front bedroom of this apartment on the first floor, and seated on the bed was the defendant, John Leaks, who is sitting next to Mr. Dwyer at the counsel table.

THE COURT: How did Virginia Stewart come to admit you to the rear door?

THE WITNESS: Agent Thompson had already been admitted to the front door, through the front door.

THE COURT: I see.

BY MR. BLACKWELL:

Q. And what was the defendant, John Leaks, doing when you saw him? A. He was seated on a bed, and in his hand he had a quantity

of gelatin capsules that each contained a white powder.

Q. And did you have a conversation with him at that time?

A. He admitted they were his.

16 MR. DWYER: I object to that, Your Honor.

THE COURT: Objection sustained.

BY MR. BLACKWELL:

Q. What did you do when you saw him with this white powder in his hand? A. I seized the capsules from his hand.

Q. They were in capsule form? A. Yes, sir.

Q. And what did you do next, after you seized these capsules from the defendant Leaks sitting there? A. I placed the defendant Leaks under arrest.

Q. All right. Well, now, you say he was seated on the bed?

A. Yes, sir.

Q. And where was the capsules? A. The capsules were in his -- were in his right hand.

* * * * *

18 Q. What are those exhibits, sir? A. Government's Exhibit No. 2-A is a brown Manila envelope into which I placed 162 capsules containing a white powder. The capsules were seized by me at 11:05 a.m. from the left night table, middle drawer, first floor bedroom of the apartment located at 1827 S Street, Northwest, Washington, D. C., on April 16th, 1962.

Q. You say you seized them from where? A. The left night table of the middle drawer, in the first floor rear bedroom apartment of 1827 S Street, Northwest, Washington, D. C.

Q. Was that before or after the defendant Leaks had been arrested?

A. After he had been arrested.

* * * * *

20 (Treasury Department evidence envelope marked Government's Exhibit No. 3 for identification; envelope and contents consisting of capsules marked Government's Exhibit No. 3-A for identification)

BY MR. BLACKWELL:

Q. I show you now, Officer Wurms, what has been marked as Government's Exhibit Nos. 3 and 3-A for identification and ask you if you have seen those exhibits before? A. Yes; I identify the small Manila envelope by my handwriting, 13 capsules containing white powder, four empty capsules --

THE COURT: How many capsules?

THE WITNESS: Thirteen capsules, Your Honor.

Q. Where did you see those, sir? A. These were seized by me from inside a glass ash tray on the left side of the bed, beside the defendant Leaks, first floor rear apartment bedroom, 1827 S Street, Northwest, Washington, D. C., 11:05 a.m., on the 16th of April 1962.

* * * * *

22 THE COURT: I take it that Exhibit 3, the 13 capsules, are covered by the sixth and seventh counts, is that correct?

MR. BLACKWELL: Yes, sixth and seventh, Your Honor.

THE COURT: No, by the fifth and sixth counts, is that correct?

MR. BLACKWELL: Fifth and sixth, yes, Your Honor.

THE COURT: Now, the seventh and eighth counts refer to 196 capsules. The witness testified to 162. I suppose that is the same quantity?

MR. BLACKWELL: That is the same, Your Honor.

* * * * *

25 MR. BLACKWELL: It's Government's Exhibit No. 3, Your Honor, 3-A would be the ones which were seized by this officer from the defendant.

THE COURT: Which counts are they?

MR. BLACKWELL: Counts five and six, Your Honor.

* * * * *

26 THE COURT: * * *

* * * * *

So, obviously, the capsules that the defendant had in his right hand and which were first seized by the agent are not covered by this

indictment. Now, there is no harm in not covering them, but I want to have the situation clear.

* * * * *

27 MR. BLACKWELL: Very well, Your Honor, we will stand on that.

* * * * *

CROSS EXAMINATION

BY MR. DWYER:

* * * * *

28 THE COURT: I want to get the picture clear in my own mind. You say Agent Thompson went to the front door. Front door of what?

THE WITNESS: Of the premises 1827 S Street.

THE COURT: Not of the apartment?

THE WITNESS: No, sir.

THE COURT: Front door of the building?

THE WITNESS: Yes, sir.

THE COURT: And you went to the rear door of the apartment?

THE WITNESS: Yes, sir, I was in the rear.

* * * * *

BY MR. DWYER:

* * * * *

29 Q. And did you say anything when you knocked? A. I waited for somebody to respond.

Q. Did you say anything at any time? A. I said -- wait a minute, let me get this straight. (Pause.) No, sir, I just knocked at the rear door.

Q. You knocked at the rear door and suddenly the door was opened, or shortly thereafter the door was opened; is that correct? A. That's correct.

* * * * *

30 Q. * * * Let me clarify this question. At any time before leaving
31 the kitchen, either when you were outside knocking or in the kitchen, did you say anything? A. I said, Hi, Virginia.

Q. Hi, Virginia. That was all? A. That was all.

Q. And when you walked out of the kitchen did she walk ahead of you or behind you? A. Ahead of me.

Q. She walked ahead of you? A. Yes, sir.

Q. And she walked into the what? A. The hallway leading to the front bedroom.

Q. And how -- all right. Then from there where did she walk? A. That was it. She took a seat on the bed.

Q. She walked into the bedroom then, is that correct? A. Yes, sir.

Q. And Leaks was on the bed, too? A. Yes, sir.

Q. And they were both sitting there? A. Yes, sir.

Q. Where was Thompson at this time? A. Thompson was in the front bedroom. I don't recall his exact position when I entered.

32 Q. He was inside the apartment? A. Yes, sir.

Q. But you don't know what room he was in? A. He was in the front bedroom.

Q. Front bedroom? A. But his exact position I don't recall.

Q. What was he doing when you arrived to the front bedroom? A. Nothing. He was just standing there.

Q. He was just standing in the bedroom? A. Yes, sir.

Q. Was there any conversation going on? A. I didn't hear any.

* * * * *

37 JOHN E, THOMPSON

called as a witness by the Government, having been duly sworn, was examined and testified as follows:

* * * * *

38 DIRECT EXAMINATION

BY MR. BLACKWELL:

* * * * *

39 Q. Directing your attention, Officer Thompson, to April 16th, 1962, did you have occasion to go to premises 1827 S Street, Northwest, here in the District of Columbia? A. I did.

Q. And why did you go there, Officer Thompson? A. To execute an arrest warrant on Virginia Stewart.

Q. All right. Now, will you tell His Honor as to just how you approached the premises in question, that is, 1827? By the way, who was with you? A. Agent Ivan Wurms.

40 Q. Tell us just how you went about executing this warrant at 1827 S Street on this particular day, April 16th 1962. A. I walked to the front door of 1827 S Street. Agent Wurms went to the rear door. I rang the door bell. The door was opened by Virginia Stewart. I placed her under arrest after identifying myself and stating that I had a warrant for her arrest. I placed her under arrest.

THE COURT: What did you say to her, Mr. Thompson? In placing her under arrest precisely, as near as you can remember, what did you say to her?

THE WITNESS: I said, I am a Federal Narcotic Agent. I had my badge in my hand so that she could see it. I said, We have a warrant for your arrest, Virginia, and you are under arrest.

* * * * *

BY MR. BLACKWELL:

Q. Then when you displayed your badge, announced that she was under arrest and informed her the nature of the arrest, what happened next, please? A. Virginia Stewart was dressed only in a slip. She

41 She had no dress or other clothes on. I said, You want to get some more clothes on before you go to jail, Virginia. And she said, Yes. I said, Where is your apartment in this house? And she said, It is up the stairs. She led me up about three steps of stairs inside this address. I then said, My partner is at the back door, waiting to come in; how can I get him in the building? And she said, Oh, that is this way. She turned around and went for -- approached a door leading to the rear of the first floor of 1827 S Street. She opened the door and entered and I followed her in.

Q. Where was your partner then? A. He was still at the back door of 1827 S Street.

Q. Well, where did you go, into her apartment? A. Yes, sir, she led me into her apartment.

Q. Well, she did not let your partner in? A. Yes, she let my partner in after I had arrived in the apartment.

Q. All right. Well, what did you observe upon your arrival in her apartment, if anything? A. I saw the defendant Leaks sitting on a bed, with a wooden chair in front of him. On the chair was a record jacket, phonograph record jacket.

* * * * *

42 Q. And what was he doing with those, if you observed? A. On the record jacket was a quantity of a white powder. He was sitting there with his hands doing something with this powder. I told him not to move. I told him that he was under arrest and told the defendant Leaks -- I told him he was under arrest and not to move. I then asked Virginia Stewart to go to the rear door to let Agent Wurms in. She did this. I picked up the record jacket and took it to a remote corner of the room, away from where Leaks was sitting. I then placed it on a bureau there and waited until I could get an envelope to transfer this powder into an envelope.

Q. And you did transfer that powder into an envelope? A. Yes, sir, I did.

* * * * *

44 Q. Did you question the defendant any about the possession of Government's Exhibits 2 and 3? A. Yes, sir, I did.

Q. And what did he say, if anything? A. He said that it was his and Virginia's, that he was in the act of capping it up or placing it into capsules, which is the common way --

* * * * *

THE COURT: Mr. Dwyer stipulated that Leaks was the tenant of the apartment and that Leaks and Virginia Stewart lived there together.

* * * * *

CROSS EXAMINATION

BY MR. DWYER:

* * * * *

45 Q. If I were to tell you that it was 34 would you say that was incorrect? A. No, sir. There is a hall that goes alongside of a front bedroom from the front door. Then you come into what probably at one time was a living room of a house. It could be.

Q. It could be 34 feet, right? A. Yes, it could be.

Q. All right. Now, somebody else lives on the first floor there of that building, don't they, in a separate apartment? A. In a front bedroom. It's just one room, I believe.

Q. Well, the room that you arrested Leaks in was Apartment No. 2, was it not? A. Yes, sir, I believe it was.

Q. And Apartment No. 1 is occupied by the janitor of the building, isn't it? A. I understood that he was the owner.

Q. But somebody else? A. Yes, sir.

Q. It's a different apartment? A. Yes, sir.

Q. Now, did you ever get beyond the bedroom of Leaks' apartment?

46 A. Yes, sir.

Q. You did? When? A. While we were in -- while Agent Wurms and I were inthe bedroom and sitting room combination of Leaks' apartment, we walked back through the kitchen area type place, back to --

Q. Who is we, sir? Would you identify who was with you? A.

Virginia Stewart and I went back there and talked out of the presence of Leaks.

Q. Was that to let Wurms in? A. No, she went by herself to let Wurms in.

Q. All right.

* * * * *

47 Q. All right. Now, when Wurms first came into the front room what was Leaks doing? A. Sitting on the bed.

Q. What was he doing besides sitting on the bed, with his hands, feet, head, or anything? A. I don't believe he was doing anything but sitting on the bed.

Q. You were watching him, weren't you? A. Yes, sir.

Q. Did he have anything in his hands? A. Yes, sir, he had some empty gelatin capsules in his hands.

* * * * *

48 THE WITNESS: I entered the room, I saw Leaks seated on the bed, I placed him -- and observed the white powder in front of him. I placed him under arrest. I picked the record jackets with the powder up. I stood there, where I could watch back toward the back door, and asked Virginia Stewart to go back there to let my partner in, Agent Wurms. I remained in this position so that I could watch her and Leaks both, on the bed and the back of the apartment, the back door.

* * * * *

51 THE COURT: I am inclined to the view that the testimony as to Counts 3 and 4 is confused and I am inclined to find the defendant not guilty on Counts 3 and 4. Apparently the memory of the two agents is at fault here. Of course, the Court realizes this happened 13 months ago and the agents have had many a matter since and their memory is not clear, but you cannot convict people of an offense punishable by imprisonment when the memory of the witnesses is not clear on the subject.

Agent Thompson testifies that he came in first, having been admitted

by Virginia Stewart, told her he had a warrant for her arrest and placed her under arrest and followed her into the apartment. Then he testified that he seized what he calls a record jacket, on which there was white powder, and arrested Leaks. He testified that then he told Virginia Stewart to go back to the rear door and to admit Wurms.

Wurms, on the other hand, testified that he was admitted through the rear door by Stewart and that he saw the defendant Leaks hold some capsules in his hand, that he, Wurms, seized the capsules and arrested Leaks.

Whereas, according to Thompson, Leaks had been arrested several
52 minutes previously because he had a record jacket in his hand or on the table in front of him, with some white powder on it.

Now, I think the recollection of the two agents varies in some important particulars there. They probably did not make a very full report at the time and so could not refresh their recollection.

So, I am inclined to find the defendant not guilty on Counts 3 and 4.

MR. BLACKWELL: If Your Honor please, the Government certainly would not take issue with Your Honor on that. We are willing to stand on Counts --

THE COURT: I find the defendant not guilty on Counts 3 and 4.

MR. BLACKWELL: We are willing to stand on Counts 5, 6, 7 and 8, Your Honor.

* * * * *

54 THE COURT: Of course, it would have been indecent for the officer to remove the defendant from the premises when she was not dressed and not give her an opportunity to put her dress on. I think that would have been police brutality.

MR. DWYER: Well, if Your Honor please, I think there is an alternative, as spelled out by the --

THE COURT: And I don't think that the police are required to carry blankets with them to throw around the defendant.

55 MR. DWYER: Well, I think, if Your Honor please, that he certainly

would have been entitled to knock on the other door and ask for something to put on her.

But apropos this observation of Your Honor that he shouldn't have taken her in a slip, he was not so much concerned that the defendant Stewart would run away so that he wouldn't let her go out the rear. Why wasn't he concerned she would escape? Because he knew that Officer Wurms was at the rear door.

THE COURT: I think it would have been improvident and he would have been derelict in his duty if he had let her go back to the apartment to get dressed without following her. She might have climbed out of the window. This was a first floor apartment.

* * * * *

61 THE COURT: * * *

62 Secondly, however, even if the question were open the Court would reach the conclusion that the search and seizure were lawful.

At the outset it is necessary to determine whether the agents made lawful entry into the apartment. Agent Thompson had an arrest warrant for the defendant Stewart, who lived with the present defendant, defendant Leaks, Leaks being the tenant of the apartment. But Leaks and Stewart were living there together on a more or less permanent basis. Agent Thompson knocked on the door. Defendant Stewart opened the door. The Agent stated that he had a warrant for her arrest and stated to her that she was under arrest. At that time she was only partially clothed, not having any dress on. The Agent gave her an opportunity to go into the apartment to put a dress on. Not to have done so would have been close to an outrage and certainly indecent.

63 However, for the Agent to have waited at the doorway while the defendant went inside, into this first floor apartment, and might possibly have climbed out of the window and escaped, would have been ludicrous. I think the Agent would have been derelict in his duty. Consequently, the Agent was lawfully in the apartment.

But there was another reason why the Agent was lawfully in the

apartment. Having made the arrest on the premises of which the defendant Stewart was a regular inhabitant, he had a right to make a search of the apartment incidental to that arrest because, indeed, he might have found chattels and articles belonging to her.

The Court holds, therefore, that Agent Thompson made a lawful entry into the apartment.

Having made a lawful entry into the apartment, he saw Defendant Leaks openly in possession of some narcotics. In other words, a felony was being committed in his presence. And arrest was made, an arrest as to Leaks, immediately. Leaks having been arrested, it was lawful to make an incidental search of his apartment where the arrest was made.

Consequently, the search and seizure were valid.

It is next argued that there is no proof that the defendant Leaks was in possession of the narcotics. Leaks was a tenant of the apartment. A tenant of a home, a house or an apartment or a room is presumed
64 to be the owner and the possessor of the articles of personal property found therein, unless the contrary appears. For example, all of the furniture, books, dishes, glassware, in my home belong to me, unless somebody can prove that they do not. There is a presumption that they do. And this is especially accentuated by the fact that the articles seized were right in the very bedroom in which the defendant slept.

Accordingly, the Court holds that possession has been proven.

* * * * *

[Filed June 10, 1963]

JUDGMENT AND COMMITMENT

On this 7th day of June, 1963, came the attorney for the government and the defendant appeared in person and by his attorney, John J. Dwyer, Esquire

IT IS ADJUDGED that the defendant has been convicted upon his plea of of the offenses of Violation of Title 26 United States Code, Section 4704a; Violation of Title 21 United States Code, Section 174 (Federal Narcotics Laws) as charged in counts five and six and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) years, Four(4) months to Seven (7) years on count Five; Seven (7) years on count Six; said sentences to run, by the counts, concurrently.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Alexander Holtzoff
United States District Judge

[Filed June 14, 1963]

NOTICE OF APPEAL

Name and address of appellant: John H. Leaks,
200 19th St., S.E., Wash. D.C.

Name and address of appellant's attorney: John J. Dwyer
602 5th St., N.W., Wash. D.C.

Offense: 26 USC 4704(a) and 21 USC 174.

Concise statement of judgment or order, giving date, and any sentence:
To serve not less than two years four months, nor more than seven years on count five and seven years on count six, to run concurrently. 7 June, 1963.

Name of institution where now confined, if not on bail: D.C. Jail.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

/s/ John H. Leaks (By John J. Dwyer)
Appellant

/s/ John J. Dwyer
Attorney for Appellant

Date: 13 June, 1963

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17955

JOHN H. LEAKS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.
FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
SYLVIA RACON,
Assistant United States Attorneys.

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 14 1963

Nathan J. Paulson
CLERK

QUESTIONS PRESENTED

1. Where a narcotics agent arrests a partially clad woman on a warrant in a public hall and, in order to maintain his arrest while she obtains adequate clothing, follows her 15–34 feet to the apartment which she shares with appellant and observes appellant in the apartment capping narcotics when she opens the door, is his arrest of appellant and seizure of narcotics lawful?

2. Where 13 capsules of heroin are found in an ashtray on the bed beside appellant and 162 capsules are found in the night table and appellant admits ownership of the heroin, is there sufficient evidence of possession by appellant?

708–755—63

INDEX

TABLE OF CASES

OTHER REFERENCES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17955

JOHN H. LEAKS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF CASE

An indictment filed on June 18, 1962, charged appellant, John H. Leaks, and Virginia Stewart in eight counts with narcotics violations under 26 U.S.C. 4707(a) and 21 U.S.C. 174 (J.A. 4–6). They entered pleas of not guilty (J.A. 1).

After severance of counts 1 and 2 due to the fugitivity of Virginia Stewart, Leaks was tried by the Court sitting without jury (J.A. 7). Leaks was found guilty on counts 5 and 6 with which counts 7 and 8 were merged (J.A. 18–19 and Tr. 64). A verdict of not guilty was entered on counts 3 and 4 (J.A. 17). By judgment and commitment filed on June 10, 1963. Leaks was sentenced concurrently on counts 5 and 6 to terms of 2 years 4 months to 7 years and 7 years (J.A. 3–4).

The Government's case rests on the testimony of Federal Narcotics Agents Thompson and Wurms. On April 16, 1963, they went to 1827 S Street, Northwest to execute an arrest warrant for Virginia Stewart. Thompson went to the front door and Wurms to a rear door (J.A. 8). Thompson rang the

bell; when Stewart appeared at the door, he announced his purpose and placed her under arrest (J.A. 13). He was "led" through a public hall to her apartment because she wished to obtain proper clothing. A brief conversation relating to location of the apartment and Wurms took place en route (J.A. 14). At the apartment he saw Leaks sitting on the bed "capping" (J.A. 14–15). Leaks was placed under arrest and Wurms who subsequently was admitted by Stewart seized 13 capsules from an ashtray and 162 capsules from a night table in the room (J.A. 9–10). The narcotic content of the capsules was stipulated (Tr. 19).

The principal question on this appeal concerns the admissibility [1] of the heroin seized from the appellant, Leaks, incident to his arrest without a warrant. The second concerns appellant's "possession" of the capsules of heroin. The evidence adduced at trial on these questions is as follows.

Agent Thompson testified that he went to 1827 S Street, Northwest "to execute an arrest warrant on Virginia Stewart." He "rang the bell. The door was opened by Virginia Stewart. I placed her under arrest." He identified himself, displayed his badge and said that he had a warrant for her arrest (J.A. 13).

Virginia Stewart was dressed "only in a slip" and in response to question said that she wanted to get some more clothes. She then "led" the agent up three steps into the building and "approached a door leading to the rear" which she "opened" and "entered" and the agent "followed her in" (J.A. 14).

The door led into her apartment where she lived with John Leaks (J.A. 8–9). It was 15 to 34 feet from the door where Agent Thompson rang the bell (Tr. 45 and J.A. 15).

At the apartment Thompson, whose experience and qualifications as a narcotic agent were stipulated, saw [2] Leaks sitting

---

[1] Appellant filed a motion to suppress (J.A. 2). The District Court record indicates that it was not acted upon and was referred to the trial judge. However, the motion was not formally renewed at trial and no objection was offered to the evidence (Tr. 50). Nonetheless, the legality of the arrest and seizure was argued by counsel and ruled upon by the Court (J.A. 18–19).

[2] The precise position of the parties at the time of the observation is not conclusively demonstrated by the record. Either the observation took place from the public hall prior to entry or it took place simultaneously with the entry.

on a bed with a "quantity of white powder" in the front of him "doing something with this powder" (J.A. 14). "He had some empty gelatin capsules in his hands" (J.A. 16). Leaks was placed under arrest and told not to move. Stewart was sent to admit Wurms (J.A. 14).

Agent Wurms entered the room where Leaks was arrested. He saw the 13 capsules in counts 5 and 6 "inside a glass ash tray on the left side of the bed, beside the defendant Leaks" (J.A. 10). He seized these and marked them. He also seized 162 capsules containing white powder from the middle drawer of the night table in the same room (J.A. 9). The 162 capsules are part of counts 7 and 8.

Leaks said to Agent Thompson that the heroin was "his and Virginia's, that he was in the act of capping it up . . ." (J.A. 15). He did not explain his possession of the narcotics. The only evidence offered by defendant was 7 pictures of the premises (Tr. 52).

The Court found that the agents made a lawful entry into the apartment. The Court commented (J.A. 18):

> . . . The Agent gave her an opportunity to go into the apartment to put a dress on. Not to have done so would have been close to an outrage and certainly indecent.
>
> However, for the Agent to have waited at the doorway while the defendant went inside, into this first floor apartment, and might possibly have climbed out the window and escaped, would have been ludicrous.

The Court further concluded that the arrest and seizure were proper and found that possession was proved (J.A. 19).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The Internal Revenue Code of 1954, amended 70 Stat. 570, 26 U.S.C.A. 7607 (1956) provides:

> The Commissioner . . . and agents, of the Bureau of Narcotics of the Department of the Treasury . . . may
>
> (1) carry firearms . . .
>
> (2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in Section 4731) or marihuana (as defined in Section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation.

The Harrison Narcotics Act, 68A, Stat. 550, 26 U.S.C.A. 4704(a) (1954) provides:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotics drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

The Narcotic Drugs Import and Export Act of 1909, 35 Stat. 614, as amended 21 U.S.C.A. 174 (1958) provides:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States . . . contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law . . . shall be imprisoned not less than five or more than twenty years . . .

> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Rule 41(e), Federal Rules of Criminal Procedure provides:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, . . . The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

SUMMARY OF ARGUMENT

I

The capsules of heroin were admissible evidence. They were lawfully seized incident to the arrest of appellant who was observed "capping" narcotics in his apartment. This observation was made by a federal narcotics agent without trespass or violation of the Fourth Amendment to the Constitution while he maintained his arrest on a warrant of Virginia Stewart who, in order to adequately clothe herself before going to jail, led the agent through a public hall into the apartment she shared with appellant. The entry and the arrest were lawful.

Appellant does not sustain his burden of proving an illegal search and seizure.

II

Unexplained physical control over heroin is "possession" which sustains a conviction under 26 U.S.C. 4704(a) and 21 U.S.C. 174. Appellant was found in his apartment "capping" heroin. 13 capsules were in the ash tray beside him on the bed. 162 capsules were in the drawer of a night table. In addition he admitted that the heroin belonged to him and to Virginia Stewart.

ARGUMENT

I. The capsules of heroin were admissible evidence.

Federal narcotics agents have authority to make arrests without a warrant when violations of the narcotic laws occur in their presence. Internal Revenue Code of 1954 as amended 70 Stat. 570, 26 U.S.C.A. 7607 (1956). Contraband seized incident to such an arrest is admissible evidence. *Draper* v. *United States*, 358 U.S. 307, 310–311 (1959).

In the case at bar appellant was observed "capping" narcotics in his apartment by federal narcotics agents (J.A. 14–15). He was placed under arrest and the capsules of heroin were seized from an ash tray beside him on the bed and from a night table (J.A. 9–10).

On these facts the capsules were clearly admissible evidence unless the agents were unlawfully in the place where they observed appellant. The trial record, however, shows overwhelming evidence of lawful presence. There is no hint of entry gained by fraud or subterfuge,[1] or of observations made surreptitiously through a transom or by trespass on adjacent porches,[2] or of coerced consent to enter.[3]

The record shows that while maintaining the arrest on a warrant of appellant's co-tenant, Virginia Stewart, a narcotic agent was led by her from the outer door of 1827 S Street Northwest through a public hall to appellant's apartment. Entry of the apartment was necessitated by the fact that Virginia Stewart was clad only in a slip and indicated a desire to obtain additional clothing (J.A. 14). As the Court noted it would have

[1] *Gatewood* v. *United States*, 93 U.S. App. D.C. 226, 209 F. 2d 798 (1953).
[2] *Whitley* v. *United States*, 99 U.S. App. D.C. 159, 237 F. 2d 787 (1956).
[3] *Waldron* v. *United States*, 95 U.S. App. D.C. 66, 219 F. 2d 37 (1955).

been indecent to take her to jail without additional clothing and it would have been dereliction of duty to send her into her apartment alone (J.A. 18). When she led the agent into the building there was a brief conversation concerning the location of the apartment and his partner (J.A. 14). She then opened the door to the apartment and the agent followed observing the appellant on the bed doing something with white powder (J.A. 14).

The agent made his observation while engaged in proper law enforcement activity, to wit: maintaining an arrest. The case at bar falls within the line of cases in this jurisdiction holding that where police are engaged in proper routine activity, they need not ignore clues or crimes lying before their eyes. Eg: *Fisher* v. *United States*, 92 U.S. App. D.C. 247, 205 F. 2d 702, *cert. denied*, 346 U.S. 872 (1953); *Ellison* v. *United States*, 93 U.S. App. D.C. 1, 206 F. 2d 476 (1953); *Lee* v. *United States*, 95 U.S. App. D.C. 156, 221 F. 2d 29 (1954); *Jennings* v. *United States*, 101 U.S. App. D.C. 198, 247 F. 2d 784 (1957); *Washington* v. *United States*, 105 U.S. App. D.C. 58, 263 F. 2d 742 (1959); *Jackson* v. *United States*, 112 U.S. App. D.C. 260, 302 F. 2d 194 (1962).

In the circumstances at bar, the question of consent to enter raised by appellant is not relevant. With or without consent, the entry was properly made in the course of maintaining an arrest. *Cf: Washington, supra*, p. 60. Moreover the cases relied upon by appellant are not applicable because (1) the record reflects no duress or coercion in making the entry voluntarily facilitated by the co-tenant and (2) the record suggests observation of a crime from the public hall before entry or simultaneously with entry.

Appellant's contention with respect to failure to announce purpose is also without merit. First, announcement of purpose was plainly made to one occupant of the apartment (J.A. 13). Second, appellant was advised that he was under arrest as soon as the agent observed his activity (J.A. 14). Third, the circumstances at bar are considerably different from the cases relied upon by appellant wherein entry is sought for the purpose of effecting an arrest or a search. Herein cause for arrest suddenly appeared either after entry or as the narcotic

agent was walking over the threshold behind a co-tenant for another purpose.

The facts and argument set forth above illustrate that appellant failed to sustain his burden of proof on the issue of illegal search and seizure. *Nardone* v. *United States,* 308 U.S. 338, 341 (1939). Appellant failed to object to admission of the evidence and failed to make a record which overcomes the presumption that the law enforcement officer acted lawfully. *Wade* v. *United States,* 104 U.S. App. D.C. 135, 259 F. 2d 950 (1958).

II. The evidence of possession of heroin was sufficient to sustain the conviction.

Possession of heroin in this case was proved by evidence of actual physical control and by the admissions of appellant. The record reveals no need for guessing, speculating or indulging in presumptions. There are no fine legal questions.

When arrested in his apartment on April 16, 1962, appellant was sitting on the bed with white powder in front of him and empty gelatine capsules in his hand (J.A. 14 and 16). He was admittedly capping heroin which belonged to him and to Virginia Stewart (J.A. 15). Next to him on the bed in an ashtray were 13 capsules filled with heroin (J.A. 10). More capsules were found near him in the middle drawer of the night table (J.A. 9).

This evidence shows possession within the meaning of 26 U.S.C. 4704(a) and 21 U.S.C. 174. *Hallman* v. *United States,* D.C. Cir. 17,119 and 17,303, May 2, 1963; *Cf: Hernandez* v. *United States,* 300 F. 2d 114, 116–119 (9th Cir. 1962). In both *Hallman* and the case at bar there were admissions of ownership of narcotics; in both cases other persons had access to the premises and in both cases narcotics were found close at hand (shoe and ashtray) and in other areas of the room (ceiling light and night table). The *Hallman* decision should be dispositive of this point.

There is no need to discuss joint tenancy or constructive possession.* The facts in this case show immediate physical control. They show more than mere presence or some vague access to the premises. *Collis* v. *United States*, 101 U.S. App. D.C. 160, 247 F. 2d 566 (1957) and *Jackson* v. *United States*, 102 U.S. App. D.C. 109, 250 F. 2d 722 (1957) relied upon by appellant are therefore inapposite. Moreover, appellant was convicted on counts 5 and 6 involving the 13 capsules in the ashtray next to him on the bed (J.A. 5 and 10 and Tr. 64). He was not convicted of possessing the narcotics found in the night table as stated in Appellant's Brief at page 8 except insofar as the counts 7 and 8 were merged.

On the facts presented, a reasonable man could fairly conclude that appellant did possess heroin. The verdict should therefore be sustained. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942).

CONCLUSION

For these reasons, it is respectfully submitted that the judgment of the District Court for the District of Columbia be affirmed.

DAVID C. ACHESON,
United States Attorney.
FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
SYLVIA BACON,
Assistant United States Attorneys.

---

*Of course, it is settled that possession may be constructive and need not be exclusive. *Jackson* v. *United States*, 94 U.S. App. D.C. 71, 214 F. 2d 240 (1954), *cert. denied*, 347 U.S. 1021; *Williams* v. *United States*, 55 App. D.C. 239, 4 F. 2d 432 (1923); *Robinson* v. *United States*, 53 App. D.C. 96, 288 Fed. 450 (1923).

U.S. GOVERNMENT PRINTING OFFICE: 1963